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Enerco Inc., v. SOS Staffing Services, Inc., Freeport Center Associates, Atlas Steel, Inc., L. Bloom & Son Ogden, wasatch Metal, Inc., John Does I-X and Doe Corporations I-X : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

ENERCO, INC., Plaintiff/Appellant, vs. SOS STAFFING SERVICES, INC., FREEPORT CENTER ASSOCIATES, ATLAS STEEL, INC., L. BLOOM & SON OGDEN, WASATCH METAL, INC., JOHN DOES I-X and DOE CORPORATIONS I-X, Defendants/Appellees.	**APPELLANT'S BRIEF** App. Court No.: 20000801-SC Priority 15 Appeal from the Final Order, Judgment and Stay entered by the Second District Court, Davis County, Judge Rodney S. Page

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutory Provisions/Rules

STATEMENT OF JURISDICTION

This appeal is from a final order and judgment of a district court pursuant to Rule 3, Utah Rules of Appellate Procedure. This Court has jurisdiction of this appeal pursuant to the Constitution of Utah, Art. VIII, Sections 3 and 5, and U.C.A. 78-2-2 (1996).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the trial court erred in ruling as a matter of law that "as a commercial landlord, Freeport [Appellee] does not owe a duty of reasonable care to its tenants to protect against loss of

or damage to property," especially in light of this Court's previous rulings including Williams v. Melby, 699 P.2d 723, 726 (Utah 1985) which held that "this Court has charged landlords with a duty to exercise reasonable care toward their tenants in all circumstances." (R.. 1496, 1536). (References designated by the letter "R" in this Brief are to the original record as paginated by the Record Index which was mailed to this Court by the trial court on or about March 27, 2001).

Standard of Review: Inasmuch as a challenge to summary judgment presents for review conclusions of law only, the appellate court reviews the conclusions for correctness, without deference to the trial court's legal conclusions. Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

B. Whether the trial court erred in ruling that "Freeport [Appellee] had no duty to protect its tenant's property from theft by third persons," especially in light of this Court's previous rulings including Williams v. Melby, supra, and Mitchell v. Pearson Enterprises, 697 P.2d 240, 246 (Utah 1985) which held that "the fact that the instrumentality which produced the injury . . . was the criminal conduct of a third person would not preclude a finding of proximate cause if the intervening agency was itself a foreseeable act." (R. 1496, 1536).

Standard of Review: Bonham v. Morgan, supra.

C. Whether the trial court erred in refusing, as a matter of law, to look beyond the contract between the parties and consider the particular facts of this case in determining whether a landlord

(Appellee) had a duty to protect its tenant (Appellant) from loss or harm, especially in light of previous Utah appellate decisions including Schreiter v. Wasatch Manor, Inc., 871 P.2d 570, 575 (Utah App. 1994) which held that in a landlord-tenant relationship, "the care to be exercised in any particular case depends on the circumstances of that case and on the extent of foreseeable danger and must be determined as a question of fact." (R. 1496, 1536).

Standard of Review: Bonham v. Morgan, supra. Also, the party against whom summary judgment has been granted is entitled to have all facts and all inferences fairly rising therefrom considered in a light most favorable to him. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

D. Whether the trial court erred in ruling as a matter of law that the Lease Agreement between the parties "does not require Freeport [Appellee] to provide security for Enerco's [Appellant] goods and it does not require Freeport to provide theft insurance for the benefit of Enerco." (R. 1535).

Standard of Review: Bonham v. Morgan, supra.

E. Whether the trial court erred in ruling as a matter of law that (1) Appellant should not have been covered by Appellee's insurance, (2) that "Freeport [Appellee] did not have a duty to obtain or maintain insurance which would cover Enerco [Appellant] for any loss caused by theft" and (3) that Appellee "had no contractual or common-law duty to provide that insurance to Enerco," especially in light of Utah appellate decisions including GNS Partnership v. Fullmer, 873 P.2d 1157,1161 (Utah App. 1994)

which held that "the landlord's insurance is presumed to be held for the tenant's benefit as a co-insured in the absence of an express agreement to the contrary." (R. 1536).

Standard of Review: Bonham v. Morgan, supra.

F. Whether the trial court erred in ruling as a matter of law that "the GNS Partnership v. Fullmer case cited by Enerco is inapplicable to the facts of this case." (R. 1495, 1536).

Standard of Review: Bonham v. Morgan, supra.

G. Whether the trial court erred in ruling as a matter of law that "Freeport [Appellee] is not in the business of storing goods for hire and with respect to Enerco's [Appellant's] goods, was not acting as a warehouseman as contemplated by the UCC." (R. 1493, 1535).

Standard of Review: Bonham v. Morgan, supra; Winegar v. Froerer Corp., supra.

H. Whether the trial court erred in ruling as a matter of law that "Freeport [Appellee] did not owe Enerco [Appellant] the statutory, common law or contract duties of a warehouseman." (R. 1493, 1535).

Standard of Review: Id.

I. Whether the trial court erred in ruling as a matter of law that "the lease agreement between the parties did not create a lease subject to the terms of the UCC," that "U.C.A. 70A-2a-101, et. seq., including 70A-2a-218 and 219, do not apply in this case," and that summary judgment was appropriate "as to any of Enerco's claims based on the UCC." (R. 1535).

Standard of Review: Id.

J. Whether the trial court erred in ruling as a matter of law that Freeport [Appellee] did not breach any provision of the written lease? (R. 1535).

Standard of Review: Id.

In addition to the cases cited, this Court has ruled that a trial court's conclusions of law are reviewed under a correction of error standard. Jacobsen Inv. Co. v. State Tax Comm'n., 839 P.2d 789 (Utah 1992). Issues of law are reviewed giving no deference to the views of the lower court. See, e.g., English v. Kienke, 774 P.2d 1154 (Utah Ct. App. 1989), aff'd, 848 P.2d 153 (Utah 1993).

DETERMINATIVE PROVISIONS

Appellant contends that the following Constitutional provisions, statutes and rules are determinative or of central importance to this appeal:

1. **Constitution of Utah, Art. I, Sec. 11**:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

2. **Constitution of Utah, Art. I, Sec. 24**:

> All laws of a general nature shall have uniform operation.

3. **U.C.A. §70A-1-102(1) (Uniform Commercial Code):**

> This act shall be liberally construed and applied to promote its underlying purposes and

policies.

4. **U.C.A. §70A-7-102(1)(f):**

> "Goods" means all things which are treated as moveable for the purposes of a contract of storage or transportation.

5. **U.C.A. §70A-7-102(h):**

> "Warehouseman" is a person engaged in the business of storing goods for hire.

6. **U.C.A. §70A-7-204(1):**

> A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

7. **Rule 56(c), Utah Rules of Civil Procedure**

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

In this case, Appellant, Enerco, Inc. (hereinafter "Enerco") leased a large commercial building from Appellee, Freeport Center Associates (hereinafter "Freeport") pursuant to a written Lease Agreement. After several million dollars of property was stolen from the commercial building, Enerco brought suit against Freeport and others. (The relevant facts will be discussed in more detail in the "Statement of Facts" below.)

After the case was filed, Enerco reached settlement agreements with SOS Staffing Services, Inc., Atlas Steel, Inc., and Wasatch Metal, Inc., and those three defendants were dismissed from this suit (R. 637, 1220 and 1227). After written discovery commenced, Freeport filed a Motion for Summary Judgment (R. 1234).

After hearing oral argument, the trial court published its "Ruling on Defendant Freeport Center's Motion for Summary Judgment" (R. 1490), and Freeport submitted a proposed Order. Appellant filed a "Notice of Objection to Defendant's Proposed Order and Judgment Regarding Freeport Center's Motion for Summary Judgment" (R. 1511) which requested that in signing the Order granting summary judgment, the trial court should (1) make an express determination that there was no just reason for delay and make an express direction for the entry of final judgment pursuant to Rule 54(b), Utah Rules of Civil Procedure, and (2) stay further proceedings in the trial court, pending this appeal, against the only other remaining defendant (L. Bloom & Son, Ogden) because the claims against that defendant were completely separate from those against Freeport.

The trial court granted Enerco's request and certified its Order as final in a "Final Order, Judgment and Stay" (R. 1534). After the summary judgment was entered against Enerco, the trial court's "Final Order, Judgment and Stay" was appealed to this Court. All procedural requirements including filing of the Notice of Appeal and filing of the Docketing Statement have been timely fulfilled.

STATEMENT OF FACTS

1. Enerco is a Delaware corporation which is in the business of purchasing equipment and other materials categorized as "surplus" from the U.S. Government in large "lots" and then reselling those items to many other individuals, governments and business entities throughout the world. (R. 646-47, 1353-54).

2. Beginning in 1993 (and then for successive periods thereafter), Freeport and Enerco entered into a written Lease Agreement by which Enerco leased one of many large warehouses located in Appellant's commercial facility (known as the Freeport Center) in Clearfield, Utah. Pursuant to that Lease Agreement, Enerco paid Freeport a monthly fee to store many millions of dollars worth of equipment and materials in the warehouse for future sales to its worldwide customers. (R. 647, 1354).

3. In late 1995, plaintiff's Managing Director, James Kim, was going on an extended trip overseas, and because he would not be in Utah, he terminated all temporary employees so that no one would be in or have access to the building. (R. 649, 1354).

4. After Kim left town, a former temporary employee, originally provided by defendant SOS, returned to the warehouse, gained access through the back door, and began stealing large amounts of goods and materials stored in the warehouse. (R. 649, 1354).

5. Over the next many days, numerous other individuals entered onto Freeport's property and into the warehouse with trailers, flatbed trucks and other vehicles to remove Enerco's property. (R. 649, 1354).

6. Freeport's front office knew that Mr. Kim often went overseas on extended trips, and also knew that while he was on such trips, no one worked in or entered into Enerco's warehouse. Indeed, when Mr. Kim went on such trips, he would leave his keys to the warehouse with Freeport's front office so that no one else could gain access to the warehouse. (R. 1423, 1354-55).

7. Prior to leaving on the above-referenced trip, Mr. Kim specifically informed Freeport's management that he would be out of town for an extended period of time and, as was his usual practice, he gave Freeport's management his keys so that no one else could gain access to his building. All of the thefts in question occurred while Freeport had plaintiff's keys and knew he was out of town. (R. 1423, 1354-55). See also Affidavit of James Kim, par. 13, (R. 1422-23); Answer No. 3 to Freeport's Interrogatories, attached as Ex. "A" to "Plaintiff's Memorandum in Opposition to Freeport Center Associates' Motion for Summary Judgment (R. 1382-86).

8. As indicated above, the thieves transported the stolen goods by using, among other things, a flatbed trailer. However, that trailer was pulled by a white Cadillac, with out-of-state license plates, and the property and materials on the trailer were not even covered. SOS's former employee admitted to the

thefts and provided information regarding thefts by other people. He participated in taking more than twenty trailer loads of Enerco's property out of the warehouse and indicated that as they drove by Freeport's security guards at the gate, those guards made no effort whatsoever to stop them and simply waved as they left the premises again and again. (R. 649-50, 1355). See also Transcript of Statement given by Larry Davis, attached as Exhibit "B" to "Memorandum in Support of Freeport Center Associates' Motion for Summary Judgment" (R. 1284-85).

9. SOS's former employee who stole much of the property stated that as they would approach Freeport's guards at the gate with these loads, he would tell his cohort:

> Hey, there's no way we can drive out of here with it like this, my God, it's just hanging off the truck, and we drove right out the door and a guy waved at us going out the gate, right out the main gate.

(Id.).

10. The materials piled on the trailers and "hanging off" included large unique and readily-identifiable items such as aircraft wings, military tug vehicles, and large military generators. (R. 1284-85, 1355).

11. The Lease Agreement fully acknowledged that Enerco would "use the premises for . . . storage and distribution of Tenant's products and materials." Freeport's management was aware of the unique type of equipment and materials Enerco had in the warehouse, and was also aware of the large volume of that equipment. (Lease Agreement, par. 2 (R. 1269); Affidavit of James

Kim, par. 5, (R. 1421)).

12. By the time Mr. Kim returned from overseas, a large amount of property, the value of which is estimated to be in excess of $7 million, had been stolen from the warehouse and disposed of by various businesses and recyclers, including those named as defendants in this case. (R. 651, 1355).

13. At the time the lease was entered into, Mr. Kim spoke with Freeport's Manager and because of the high value of Enerco's property, specifically questioned him about security at the Freeport Center. Freeport's Manager gave Mr. Kim verbal assurances and representations regarding the security at the Freeport Center. Among other things, Mr. Kim was told that there would be security guards protecting the gate at the Freeport Center, that "there is ample security here," that Enerco's property would be safe, and that he had never heard of anyone stealing from Freeport's tenants. (James Kim Affidavit, par. 7, R. 1421).

14. These statements were important to Mr. Kim in deciding to store Enerco's valuable goods at the Freeport Center, and he relied upon them in making the decision to do so. (James Kim Affidavit, par. 8. R. 1421).

15. Mr. Kim was also given other materials at the time the lease arrangements were made. In those materials, it was unequivocally stated, among other things, that "Freeport Center is protected by five miles of ten foot chain link fencing" and "a roving security guard patrols the center's 735 acres on weekends, at night and on holidays." (James Kim Affidavit, par. 9, R. 1422).

16. The materials given to Mr. Kim also represent that Freeport is protected by "an electronic surveillance system" which is connected with "the Freeport Center Administrative Offices and patrol vehicle." James Kim also relied on these materials and the representations and promises made therein. (James Kim Affidavit, par. 10, R. 1422).

17. While Mr. Kim was gone on his long overseas trip, thieves also gained access to the building by kicking in the back door, and one of the big metal lift-up doors "had been kicked into pieces in order to gain access." (R. 1301, 1358).

18. Regarding insurance, the Lease Agreement specified:

> Tenant will not permit the demised premises to be used for any purpose . . . which would cause an increase in insurance premiums, render the insurance thereon void or cause cancellation thereof.

(R. 1269).

19. The Lease Agreement further specified regarding insurance that:

> Tenant shall also pay to Landlord any amount by which the property insurance premiums allocable to the demised premises for any year during the term of this Lease exceed the annual premium . . . presently paid by Landlord for the demised premises prior to Tenant's occupancy. . . . Landlord will provide Tenant with a complete computation of any premium increase on the demised premises and within thirty (30) days thereafter Tenant will pay Landlord the insurance premium increase as set forth in the computation.

(R. 1271).

20. The Lease Agreement further specified regarding insurance that:

> Landlord and Tenant each further warrant that insurance companies insuring Landlord or Tenant shall have no rights against the other, whether by assignment, subrogation or otherwise.

(R. 1272).

21. The Lease Agreement specified that "[i]nterpretation, construction and performance of this Lease shall be governed by the laws of Utah." (R. 1275).

SUMMARY OF ARGUMENT

Utah law mandates that Landlords have duties to exercise reasonable care "in all circumstances." This Court has unequivocally held that with regard to landlord cases, "the care to be exercised in any particular case depends on the circumstances of that case and on the extent of foreseeable danger involved, and must be determined as a question of fact." The trial court erred in holding, as a matter of law, that Freeport had no duty of reasonable care to Enerco.

It was certainly foreseeable that Freeport's failure to provide adequate security would allow, if not encourage, exactly what occurred in this case. Furthermore, Freeport's general duty in this case was increased by the fact that it actually undertook to render security services by providing guards at the gate, roving security guards, etc.

Utah law requires that "the landlord's insurance is presumed to be held for the tenant's benefit as a co-insured in the absence of an express agreement to the contrary." In this case, no such agreement to the contrary exists and in fact, the Lease Agreement

makes it clear that the parties contemplated insurance being in place and that no subrogation rights would exist against each other, as is required in all co-insured situations.

Freeport owed Enerco the duties of a warehouseman, and is statutorily liable for the loss of Enerco's goods. The actions set forth herein breached the contract between the parties, and any ambiguities must be construed against Freeport. For all of these reasons, an award of summary judgment was inappropriate.

ARGUMENT

Introduction

The trial court failed to consider and apply the strict standards which must be applied to summary judgment motions. This Court has unequivocally held that "summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Bowen v. Riverton City, 656 P.2d 434 (Utah 1982), emphasis added. This Court has also mandated that

> If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment.

Id. at 436, see also Durham v. Margetts, 571 P.2d 1332 (Utah 1977). Finally, this Court has held that when the case involves claims of negligence, summary judgment "is appropriate only in the most clear-cut case." Bowen, supra at 436.

Enerco offered overwhelming evidence to the trial court that Freeport was negligent in this case. When that evidence is further viewed "in a light most favorable" to Enerco and when "any doubt or uncertainty concerning questions of fact" is resolved in Enerco's favor, as it must be, Freeport's motion should have been denied.

As is discussed below, the agreements in question, Utah statutory law, and Utah case law all required Freeport to properly protect plaintiff's property. Reasonable minds could certainly differ as to whether Freeport did so. For example, reasonable minds could differ as to whether Freeport's guards should have been suspicious of a Cadillac with out-of-state plates pulling a flat-bed trailer, driven by unkempt individuals with long hair, driving past the guards more than twenty times with Enerco's aircraft wings, sensitive electronics equipment, military tug vehicles, and plaintiff's other high-tech military equipment loaded on the back and hanging off the sides. As indicated in the statement of facts above, even the thieves themselves were shocked that the guards did nothing and just repeatedly waved to them as they drove out.

Reasonable minds could certainly differ as to whether the security guards should have waved at this spectacle when Freeport knew no one else in the facility had this type of equipment, that it had plaintiff's keys, that James Kim was out of town, and that there was no reason to be moving his inventory because he had not ended his lease. Reasonable minds could certainly differ whether Freeport's promised "roving security guards" should have seen the large metal door to plaintiff's warehouse repeatedly kicked in and

in pieces. Reasonable minds could certainly differ why the "surveillance system" Freeport had promised was not in operation and whether it would have prevented the thefts from occurring.

Point I. Enerco's Negligence Claim was Improperly Dismissed

The trial court incorrectly ordered that Enerco's negligence claim should be dismissed. Its basis for doing so was its holding that "[a]s a commercial landlord, Freeport does not owe a duty of reasonable care to its tenants to protect against loss of or damage to property" and its related holding that "Freeport had no duty to protect its tenant's property from third persons, except as may arise by agreement of the parties." (R. 1536).

Utah case law has repeatedly recognized the common law duty of a landlord to protect its tenants. In Hall v. Warren, 632 P.2d 848 (Utah 1981), this Court flatly stated that "the duty of the landlord to use reasonable care to protect lessees may rest on common law principles of negligence." Id. at 850.

In Williams v. Melby, 699 P.2d 723 (Utah 1985), this Court enlarged those duties and noted that "the common law duty of a landlord has been expanded in virtually every state, either judicially or by statute, beyond the narrow common law categories." Id. at 726. The Court explained that "this court has charged landlords with a duty to exercise reasonable care toward their tenants in all circumstances. Landlord liability is no longer limited by the artificial categories developed by the common law." Id. at 726, emphasis added.

This Court also noted that "in the instant case, the landlord's duty was to use reasonable care" and then made the significant ruling that "whether a defendant has breached the required standard of care is generally a question for the jury." Id. at 727. Important to this case is the fact that the Court also held that "summary judgment should be granted with great caution in negligence cases" (Id. at 725) and then concluded that "the care to be exercised in any particular case depends upon the circumstances of that case and on the extent of foreseeable danger involved and **must** be determined as a question of fact." Id. at 727, emphasis added.

As indicated above, "the care to be exercised in any particular case depends upon . . . the extent of foreseeable danger involved," and this is equally true when, as in this case, the injury was produced by the criminal conduct of a third person. For example, in Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985), this Court discussed the duties of innkeepers to their clients and clearly held that "the fact that the instrumentality which produced the injury . . . was the criminal conduct of a third person would not preclude a finding of proximate cause if the intervening agency was itself a foreseeable act. Id. at 246.

Like the innkeeper in Mitchell, Freeport is a commercial entity which, for a set fee, provides temporary premises to a client for a fixed period of time. In Mitchell, this Court explained that innkeepers owe a duty of "ordinary care to see that the premises assigned to [clients] are reasonably safe for their

use and occupancy." Id. at 243. Regarding the issue of negligence, this Court held that "it is foreseeable that an innkeeper's failure to maintain adequate security measures not only permits but may even encourage intruders to rob . . . hotel patrons." Id., emphasis added. This Court then stated: "Thus, in meeting its standard of ordinary care, a hotel must provide security commensurate with the facts and circumstances that are or should be apparent to the ordinary prudent person." Id., emphasis added.

It is important to note that both innkeepers and warehousers are also specifically categorized by Utah law as "public servants" who "may not contract to escape potential liabilities for their ordinary negligence." Russ v. Woodside Homes, Inc., 905 P.2d 901, 907 (Utah App. 1995). If it is foreseeable that a hotel's "failure to maintain adequate security measures" would not only permit, but "may even encourage intruders to rob" clients, it is certainly foreseeable that the exact same failure would at least permit, and probably encourage intruders to do the same at the Freeport Center.

A nation-wide review of cases indicates that other states have also extended landlords' duties in cases specifically involving the criminal conduct of third persons. For example, in Braitman v. Overlook Terrace Corp., 132 N.J. Super. 51, 332 A. 2d 212 (1974), the court, referring to other state and federal cases, stated that "a landlord does owe a duty to take reasonable steps to protect a tenant from foreseeable criminal acts committed by third persons." Id. at 214.

In Vermes v. American Dist. Tel. Co., 251 N.W.2d 101 (Minn. 1977), the Minnesota Supreme Court reviewed a case in which, as in the present case, a business brought suit against its landlord because the business' inventory had been stolen. While the landlord apparently accepted the inescapable fact that it owed a duty of protection to the tenant, it argued that the burglary was an "intervening cause" which relieved it from liability. In rejecting this argument the court explained:

> To succeed with this line of argument, [Landlord] must show that the burglary was not "reasonably foreseeable" under the circumstances. Prosser analyzes the general problem and the specific case of criminal acts as follows:
>
> > "If the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, he may be negligent, among other reasons, because he has failed to guard against it; or he may be negligent only for that reason.
> >
> > The same is true as to those intervening intentional or criminal acts which the defendant might reasonably anticipate, and against which he would be required to take precautions." [Citation omitted].

Id. at 105, emphasis added.

The trial court suggested that Freeport did not "owe a duty of reasonable care to it tenants" because it is a commercial landlord. However, this Court has never limited the above-referenced duty of reasonable care to non-commercial landlords, but instead used extremely broad language in indicating that "this court has charged landlords with a duty to exercise reasonable care toward their tenants in all circumstances." Williams, supra at 726, emphasis

added. It is also important to note that in the above-referenced cases from other states, it was never even suggested that commercial tenants should be treated differently than non-commercial tenants.

Limiting the duty of "reasonable care" to non-commercial tenants, as the trial court proposes, not only violates this Court's "all circumstances" mandate, but would also violate the Utah Constitution's guarantee that "[a]ll laws of a general nature shall have uniform operation." (Utah Constitution, Art. I, Sec. 24). There is no justifiable reason to apply a duty of reasonable care to one group of tenants but not to another. Any tenant should have the right to equal protection under the law and the trial court simply offered no explanation as to why "all circumstances" should somehow exclude commercial tenants.

Furthermore, it is almost universally accepted that if a landlord chooses to provide security, his general duty increases. For example, in Sharp v. W.H. Moore, Inc., 796 P.2d 506 (Idaho 1990), the plaintiff sued the property manager of a commercial building. As this Court has held, the Idaho Supreme Court held that "a landlord is under a duty to exercise reasonable care in light of all the circumstances" and that "it is for a jury to decide whether that duty was breached." Id. at 509. The court then held:

> One who voluntarily assumes a duty also assumes the obligation of due care in performance of that duty. A landlord, having voluntarily provided a security system, is potentially subject to liability if the security system fails as a result of the landlord's negligence. Jardel Co. v. Hughes, 523 A.2d 518 (Del. 1987) (having

provided security, owner must anticipate conduct of third persons) [other citations omitted].

This Court has ruled likewise. In DCR, Inc. v. Peak Alarm Company, 663 P.2d 433 (Utah 1983) this Court explained:

> A majority of jurisdictions, like Utah, have recognized a duty to exercise reasonable care on the part of one who undertakes to render services. Restatement (Second) of Torts formulates this principle as follows: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."

Id. at 436, emphasis added. There is no question that Freeport "undertook to render services." It had (or at least represented it had) a surveillance system. It had guards at its gate. It had roving security guards to protect the premises. Having undertaken the service of providing security, Freeport is "subject to liability . . . for physical harm resulting from [its] failure to exercise reasonable care to perform [its] undertaking."

Freeport did have a duty to exercise reasonable care, its duties were increased when it actually undertook to render security services, and this Court has already specifically ruled in a landlord case that "the care to be exercised in any particular case depends upon the circumstances of that case and on the extent of foreseeable danger involved and **must** be determined as a question of fact." For all of these reasons, the trial court erred in holding that Freeport does not owe such duties and that, as a matter of law, Enerco's negligence claims should be dismissed.

Point II. Enerco Should be Covered as a Co-Insured Under Freeport's Insurance Policy

Enerco feels strongly that the trial court erred in holding that Enerco should not have been covered by Freeport's insurance policy and that "the GNS Partnership v. Fullmer case cited by Enerco is inapplicable to the facts of this case." (R. 1536). As set forth above, paragraph 3 of the Lease Agreement clearly contemplates that Freeport would maintain insurance protection on the warehouse in question because the agreement instructed Enerco not to do anything "which would cause an increase in insurance premiums, render the insurance thereon void or cause cancellation thereof." (Emphasis added). Likewise, paragraph 13(B) of the Lease Agreement even specified, to the penny, what the insurance premium would be, and required Enerco to contribute additional funds if the premium exceeded that amount. (R. 1271).

These contractual provisions, which leave no question that Freeport would have insurance on the building, are critical because Utah law has mandated that a tenant is a co-insured under its landlord's insurance policy. In GNS Partnership v. Fullmer, 873 P.2d 1157 (Utah App. 1994), the court referred to the overwhelming majority of American cases and explained that "the majority hold the landlord's insurance is presumed to be held for the tenant's benefit as a co-insured in the absence of an express agreement to the contrary." Id. at 1161, emphasis added.

The court indicated that "we find the majority view to be more persuasive" (Id.) and went on to explain that "the landlords, of course, could have held out for an agreement that the tenant would

furnish . . . insurance on the premises. But they did not. They elected to themselves purchase the coverage." Id.

In this case, Freeport likewise could have "held out for an agreement that the tenant would furnish insurance on the premises." Not only did it not do so, but it repeatedly indicated in the Lease Agreement that it would do so. Enerco's only obligation was to pay any amounts which "exceeded" Freeport's premium.

Clearly, making Enerco a co-insured under Freeport's policy will restrict certain rights which Freeport's insurer would have had against Enerco (such as Freeport's insurer's right to subrogate against Enerco). However, no prejudice will occur to Freeport or its insurer because paragraph 15(B) of the Lease Agreement itself specified that "Landlord and Tenant each further warrant that insurance companies insuring Landlord or Tenant shall have no rights against the other, whether by assignments, subrogation or otherwise." (R. 1272, emphasis added).

Obviously, if Enerco were not a co-insured, Freeport's insurance company would have rights against Enerco, including the right to subrogation which exists as to all other non-insureds. The fact that the Lease agreement specifically excluded that subrogation right is strong evidence of the propriety and application in this instance of Utah law holding that "the landlord's insurance is presumed to be held for the tenant's benefit as a co-insured in the absence of an express agreement to the contrary."

The trial court erred in holding, as a matter of law, that Enerco was not covered by Freeport's insurance policy and that the GNS Partnership case was not applicable to the facts of this case.

Point III. Freeport Owed Enerco the Duties of a Warehouseman

The trial court erred in ruling that Freeport "was not acting as a warehouseman as contemplated by the UCC" and that Freeport "did not owe Enerco the statutory, common law, or contract duties of a warehouseman." (R. 1535). Part of the Uniform Commercial Code which Utah has statutorily adopted deals specifically with warehousers. U.C.A. §70A-7-102 indicates that a "'warehouseman' is a person engaged in the business of storing goods for hire." (Emphasis added). The "general definitions" section of the title indicates that a "'person' includes an individual or an organization." (U.C.A. 70A-1-201(30)).

The term "goods" is defined as "all things which are treated as movable for the purposes of a contract of storage or transportation." (U.C.A. 70A-7-102(1)(f)). Enerco's property constituted "goods" under the statute and Freeport is a warehouser under the statute.

This designation is important because the statute goes on to specifically mandate that:

> A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such reasonable care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

U.C.A. 70A-7-204(1), emphasis added. Enerco believes that pursuant

to this statute, Freeport has not only a common-law duty to exercise reasonable care, but also a statutory duty to do the same. Even if this Court rules that Freeport is not bound by the UCC, this statute conclusively shows that under Utah law, a tenant which has entered into a "lease contract" for purely commercial reasons is entitled to a duty of "reasonable care."

Point IV. Freeport Breached it Contract in This Case

Although the trial court ruled in favor of Enerco on its claim that Freeport breached implied contracts, it erred in ruling that "Freeport did not breach any provision of the written Lease. (R. 1535). Paragraph 15 of the Lease Agreement mandates that "[i]f the demised premises or any part thereof shall be damaged or destroyed by fire or other casualty, Landlord shall promptly repair all such damage and restore the demised premises without expense to Tenant." (R. 1272). Paragraph 29 of the Lease Agreement requires that "[t]ime is of the essence of this Lease and every term, covenant and condition herein contained." (R. 1277).

The doors were not repaired, especially in a timely manner, as they were kicked in and "left in pieces" for the perpetrators to gain access night after night for an extended period of time. Such constituted a breach by Freeport of the express provisions of the agreement.

While Enerco believes the above-quoted provisions of the Lease are clear regarding the landlord's obligations to provide insurance, provide security, and promptly repair damage, at a minimum, they create ambiguities which must be construed against

Freeport. In addition to the requirement to view all evidence in a light most favorable to plaintiff, Utah law requires that in all situations, "any ambiguity in a lease shall be construed against the lessor." Edwards and Daniels v. Farmers Properties, 865 P.2d 1382, 1386, n.5 (Utah App. 1993), emphasis added. This law applies not only to lease agreements, but also to any other types of contracts:

> The well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who has drawn the agreement.

Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982). In this case, the written Lease Agreement was drafted entirely by Freeport and therefore, the contract must be construed against it.

Although Enerco believes the above-referenced provisions in the Lease Agreement unambiguously imposed obligations on Freeport which Freeport did not fulfill, to the extent those provisions create ambiguities, those ambiguities also enable this court to consider other extrinsic evidence (including the sales brochure, the testimony of James Kim, verbal promises made by Freeport employees, etc.). This Court has held that "if a contract is ambiguous, the court may consider the party's actions and performance as evidence of the party's true intention." Plateau Min. v. Utah Div. of State Lands, 802 P.2d 720, 725 (Utah 1990). See also Interwest Construction v. Palmer, 923 P.2d 1350, 1359 (Utah 1996): "Once a contract is found to be ambiguous, a court may consider extrinsic evidence to determine its meaning."

Not only do ambiguities allow the court to consider extrinsic evidence, but they also preclude granting summary judgment as a matter of law:

> Only when contract terms are complete, clear, and unambiguous can they be interpreted by the judge on a motion for summary judgment. [Citation omitted.] If the evidence as to the terms of an agreement is in conflict, the intent of the parties as to the terms of the agreement is to be determined by the jury.

Colonial Leasing Company v. Larsen Brothers Construction, 731 P.2d 481, 488 (Utah 1986). Even more recently, this Court held:

> A motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended.
>
> When ambiguity does exist, the intent of the parties is a question of fact to be determined by the jury. Failure to resolve an ambiguity by determining the parties' intent from parol evidence is error.

Plateau Mining, supra at 725.

The Lease Agreement's promises, including that insurance protection would be maintained on the warehouse in question and that Freeport would promptly repair all damages, create, at a minimum, ambiguities as to Freeport's duties. Those ambiguities must be construed against Freeport because it drafted the Lease. Those ambiguities also allow consideration of extrinsic evidence including Freeport's sale brochures, verbal promises and other actions of Freeport's employees. The trial court erred in granting summary judgment on Enerco's breach of contract claim.

CONCLUSION

Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All the evidence must be evaluated in a light most favorable to Enerco, and any doubt or uncertainty must be resolved in its favor. When cases involve negligence, summary judgment is appropriate only in the most clear-cut case.

Utah law mandates that Landlords have duties to exercise reasonable care "in all circumstances." This Court has unequivocally held that with regard to landlord cases, "the care to be exercised in any particular case depends on the circumstances of that case and on the extent of foreseeable danger involved, and must be determined as a question of fact." It was certainly foreseeable that Freeport's failure to provide adequate security would allow, if not encourage, exactly what occurred in this case. Furthermore, Freeport's general duty in this case was increased by the fact that it actually undertook to render security services by providing guards at the gate, roving security guards, etc.

Utah law requires that "the landlord's insurance is presumed to be held for the tenant's benefit as a co-insured in the absence of an express agreement to the contrary." No such agreement to the contrary exists and in fact, the Lease Agreement makes it clear that the parties contemplated insurance being in place and that no subrogation rights would exist against each other, as is required in all co-insured situations.

Freeport owed Enerco the duties of a warehouseman, and is statutorily liable for the loss of Enerco's goods. All of the actions set forth herein breached the contract between the parties, and any ambiguities must be construed against Freeport.

For all of these reasons, Enerco submits that the trial court erred and respectfully requests that the judgment entered in favor of Freeport be reversed as set forth herein.

RESPECTFULLY SUBMITTED this 11th day of June, 2001.

Michael L. Schwab
Lloyd A. Hardcastle
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of June, 2001, I caused a true and correct copy of the foregoing document to be hand-delivered and/or mailed to the following:

John R. Lund
Julianne P. Blanch
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Theodore R. Weckel
1220 North Main, Suite 7
Springville, Utah 84663

ADDENDUM

APPENDIX A: Final Order, Judgment and Stay signed by the trial court on August 15, 2000

APPENDIX B: Lease Agreement

APPENDIX C: Affidavit of James Kim

APPENDIX "A"

Michael L. Schwab [A4662]
Lloyd A. Hardcastle [A5079]
SCHWAB & HARDCASTLE
225 South 200 West
P.O. Box 118
Farmington, Utah 84025-0118
Telephone: (801) 451-6560
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Attorneys for Plaintiff

IN THE SECOND DISTRICT COURT OF THE JUDICIAL DISTRICT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

ENERCO, INC., Plaintiff, vs. SOS STAFFING SERVICES, INC., FREEPORT CENTER ASSOCIATES, et al., Defendants.	**FINAL ORDER, JUDGMENT AND STAY** Civil No.: 970700262 CN Judge Rodney S. Page

This Court signed a "Ruling on Defendant Freeport Center's Motion for Summary Judgment" on or about January 11, 2000. Thereafter, defendant Freeport Center ("Freeport") submitted a proposed "Order and Judgment Regarding Freeport Center's Motion for Summary Judgment."

After receiving the proposed Order, plaintiff ("Enerco") filed a Notice of Objection, which made certain objections to Freeport's proposed Order and which requested that the Order signed by the Court be certified as a final order and judgment pursuant to Rule 54(b), Utah Rules of Civil Procedure.

A hearing on plaintiff's Notice of Objection was held before

this Court on July 18, 2000, at which time the Court heard oral argument from both counsel of record. Having heard that argument, reviewed the relevant pleadings, and good cause appearing therefore, the Court makes the findings and conclusions set forth herein and hereby DECREES, ADJUDGES, and ENTERS A FINAL ORDER AND JUDGMENT as follows:

1. Freeport is not in the business of storing goods for hire and with respect to Enerco's goods, was not acting as a warehouseman as contemplated by the UCC. Therefore, Freeport did not owe Enerco the statutory, common law or contract duties of a warehouseman. Summary judgment is granted to Freeport as to any claims based on the duties of a warehouseman.

2. The lease agreement between the parties did not create a lease subject to the terms of the UCC. Specifically, U.C.A. 70A-2a-101, et. seq., including 70A-2a-218 and 219, do not apply in this case. Summary judgment is granted to Freeport as to any of Enerco's claims based on the UCC.

3. The written lease agreement between Enerco and Freeport is valid and enforceable. That agreement does not require Freeport to provide security for Enerco's goods and it does not require Freeport to provide theft insurance for the benefit of Enerco. Freeport did not breach any provision of the written lease. Specifically, it did not breach the lease by failing to repair a door as alleged by Enerco, because there was no written notice given by Enerco concerning the door. Summary judgment is granted to Freeport and against Enerco as to any of Enerco's claims for

breach of the written lease agreement.

4. Under Utah law, Freeport did not have a duty to obtain or maintain insurance which would cover Enerco for any loss caused by theft. It had no contractual or common-law duty to provide that insurance to Enerco. The GNS Partnership v. Fullmer case cited by Enerco is inapplicable to the facts of this case. Summary judgment is granted to Freeport and against Enerco as to claims that Enerco should have been covered by or added to Freeport's insurance policy.

5. As a commercial landlord, Freeport does not owe a duty of reasonable care to its tenants to protect against loss of or damage to property. Freeport had no duty to protect its tenant's property from theft by third persons, except as may arise by agreement of the parties. Summary judgment is granted to Freeport and against Enerco as to all of Enerco's claims based on negligence.

6. As to Enerco's claims that the parties entered into implied agreements whereby Freeport would provide security for Enerco's property, the Court finds that there are contested issues of fact. Summary judgment is therefore denied as to Enerco's claim for breach of implied contracts.

7. Regarding this Order and Judgment, specifically all matters on which summary judgment has been granted above, the Court hereby makes an express direction for the entry of final judgment, further makes the express determination that there is no just reason for delay of its entry, and certifies this Order and Judgment as final for appeal.

8. Pursuant to Enerco's request under Rule 62, Utah Rules of Civil Procedure, the Court hereby stays enforcement of the judgment and other proceedings before this Court so that Enerco may pursue an appeal. This stay shall not prohibit counsel from voluntarily agreeing between themselves to conduct additional investigation, or seeking assistance from the Court which either deems is appropriate.

DATED this 15 day of August, 2000.

BY THE COURT:

DARWIN C. HANSEN
DISTRICT JUDGE

Honorable Rodney S. Page
Second District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2000, I caused a true and correct copy of the foregoing document to be mailed, postage prepaid, to the following:

John R. Lund, Esq.
Snow, Christensen & Martineau
P.O. Box 45000
Salt Lake City, Utah 84145

Theodore R. Weckel
MATTHEW HILTON, P.C.
1220 North Main Street, #5A
P.O. Box 781
Springville, UT 84663

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APPENDIX "B"

FREEPORT CENTER ASSOCIATES

CLEARFIELD, UTAH

LEASE

This Lease made and entered into this 9th day of July 19 93, by and between FREEPORT CENTER ASSOCIATES, hereinafter called "Landlord", and ENERCO INC., hereinafter called "Tenant."

WITNESSETH:

In consideration of the covenants and agreements of the respective parties herein contained, the parties hereto do hereby agree as follows:

DEMISED PREMISES

Landlord hereby leases to Tenant, and Tenant hires from Landlord the premises described on Exhibit "A" annexed hereto as a part hereof, together with the improvements thereon (hereinafter referred to as the "demised premises" or "premises") for the term and upon the rental and the covenants and agreements of the respective parties herein set forth. Said premises are located in the City of Clearfield, County of Davis, State of Utah.

TERM

The term of this Lease shall be Six Months beginning on the 1st day of August 19 93, and ending on the 31st day of January 19 94, both dates inclusive, unless sooner terminated as herein provided.

TERMS AND CONDITIONS OF LEASE

This Lease is made on the following terms and conditions which are expressly covenanted and agreed to by Landlord and Tenant:

1. **RENT:** Tenant agrees to pay as rental to Landlord at the office of Landlord, Clearfield, Utah, or at such other place as Landlord may from time to time designate in writing, without any offset or deduction whatsoever, the total sum of ----- Twelve Thousand Four Hundred Eighty and No/100 Dollars ($ 12,480.00) over the term of this Lease in lawful money of the United States in monthly installments of ----- Two Thousand Eighty and No/100 Dollars ($2,080.00) due and payable on the first day of each month (the "rent"). Any other amounts or expenses payable by Tenant to Landlord under this Lease, including amounts payable under Paragraphs 13 and 24, shall be payable upon the rendition of the Landlord's Statement therefor. If Tenant shall fail to pay the

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rent within five (5) days after the first day of the month, or shall fail to pay any other amounts payable by Tenant pursuant to the provisions of this Lease within ten (10) days after the rendition of the Landlord's Statement. Tenant shall pay Landlord interest thereon at the rate of 18% per annum, which interest shall run from either (a) the day when the Rent was due, (b) the date Landlord's Statement for certain increases under Paragraph 13 is sent to Tenant, or (c) for any other amounts or expenses payable by Tenant, the date of Landlord's expenditures. Notwithstanding the foregoing, Landlord shall have all legal remedies available for the enforcement of the payment of rent and other expenses of Tenant hereunder, including the power to evict for nonpayment of rent or other expenses of tenant as provided in Paragraph 24.

2. **AUTHORIZED USE:** Tenant shall use the premises for the following purpose and for no other purpose whatsoever, without the written consent of the Landlord first had and obtained:

Storage and distribution of Tenant's products and materials.

Tenant represents and covenants that it will not produce, store or use any hazardous or toxic waste or substance, PCB, dioxin or asbestos on the premises.

3. **INCREASING INSURANCE RISK:** Tenant will not permit the demised premises to be used for any purpose, other than those noted in Paragraph 2, which would cause an increase in insurance premiums, render the insurance thereon void or cause cancellation thereof. In the event the insurance is cancelled because of a change in Tenant's use of the premises, Tenant will be liable for any loss or damage to the building occurring before reinstatement or replacement of that insurance.

4. **CONDITION OF THE PREMISES:** Tenant has inspected the demised premises including all equipment which is a part thereof and accepts the premises in the condition they are in at the time of the commencement of the term of this Lease without any representation express or implied on the part of Landlord or its agents as to the condition of the premises, or suitability of the premises for Tenant's use.

5. **COMPLIANCE WITH GOVERNMENTAL REQUIREMENTS:** Tenant shall, at Tenant's own expense, comply with all laws, ordinances, regulations or orders of any federal, state, county, municipal or other public authority affecting the Tenant's use of the premises promptly correcting any non-compliance upon discovery thereof and Landlord hereby consents to any action reasonably taken by Tenant to correct such non-compliance. Tenant will not commit any waste on the premises nor permit any obnoxious odors or noise to emanate from the premises, nor shall it knowingly use or permit the use of the premises in violation of any present or future law, rule or regulation of the United States or of the State of Utah, or in violation of any county or municipal ordinance or regulation applicable thereto.

6. **CARE OF BUILDING BY TENANT:** Tenant agrees to keep the interior of the building and the improvements on the premises inside and outside the building and the grounds in good condition and repair including proper servicing and maintenance of all equipment. The equipment and fixtures to be maintained include without limitation, lighting fixtures, heating and air conditioning equipment, truck dock bumpers, overhead freight doors (including all repairs thereto) and electrical wiring and plumbing systems. Tenant agrees to contract with a qualified heating and air conditioning service company for periodic maintenance and service of HVAC equipment. Such service to be at a minimum twice per year. Such work by Tenant also includes cleaning and painting the interior of the premises as Tenant deems necessary in order to maintain said premises in a clean, attractive and sanitary

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condition. Tenant shall keep the vehicular parking areas, pedestrian walkways, entranceways and docks reasonably free from icicles, ice and snow and shall keep the grounds surrounding the demised premises clean, promptly removing therefrom all trash, rubbish, cartons or other debris. If the Tenant fails to do any of the foregoing as herein required Landlord may elect to proceed under one or more of its remedies as set forth in Paragraph 24 of this Lease.

7. **REPAIR OF BUILDING BY LANDLORD:** Landlord agrees for the term of this Lease to maintain in good condition, subject to such conditions as Tenant has accepted at the time of taking possession, the components of the demised premises, unless said walls, floor, foundation, roof or other structural components are damaged as a result of Tenant's, or its employees and agents, actions or breach of the provisions of this Lease. Landlord shall not, however, be obligated to make any such repairs until written notice of the need of repair shall have been given to the Landlord by the Tenant and after such notice is so given, the Landlord shall have a reasonable time in which to make such repairs. Landlord shall not be liable for any resulting damage to the contents unless it fails to diligently proceed to correct such defect after receipt of written notice.

8. **INSTALLATION, ALTERATIONS AND REMOVALS:** It is expressly agreed and understood that the Tenant will make no alterations, additions or betterments to, or installations ("alterations") upon the leased premises without the prior written approval of the Landlord which approval shall not be unreasonably withheld. Such alterations, if approved, shall be made at Tenant's expense. All such alterations shall become a part of the premises and may not be removed by Tenant at termination of this Lease unless Landlord gives written notice to Tenant to remove all or some part of such alterations, in which event Tenant shall remove such alterations upon termination.

9. **ERECTION AND REMOVAL OF SIGNS:** Subject to the restrictions of this Paragraph, Tenant may place suitable signs on the leased premises for the purpose of indicating the nature of the business carried on by the Tenant in said premises. Such signs shall be approved by the Landlord in writing prior to their erection, which approval shall not be unreasonably withheld, and shall not damage the leased premises in any manner. Tenant shall remove all signs prior to the expiration of the term.

10. **GLASS:** Tenant agrees to immediately replace all glass broken or damaged during the term of this Lease with glass of the same quality as that broken or damaged.

11. **RIGHT OF ENTRY BY LANDLORD:** The Tenant at any time during the term of this Lease shall permit inspection including environmental sampling or testing of the demised premises during reasonable business hours by the Landlord's agents or representatives for the purpose of ascertaining the condition of the demised premises and compliance with governmental laws and regulations, and in order that the Landlord may make such repairs as may be required to be made by the Landlord under the terms of this Lease. Sixty (60) days prior to the expiration of this Lease, Landlord may post suitable notices on the demised premises that the same are "To Let" and may show the premises to prospective tenants at reasonable times. Landlord shall not, however, thereby unnecessarily interfere with the use of demised premises by the Tenant.

12. **PAYMENT OF UTILITIES:** Tenant shall pay all charges for water, sewer, heat, gas, electricity, telephone and other public utilities used on the premises.

13. **PAYMENT OF CERTAIN INCREASES IN PROPERTY TAXES AND INSURANCE:**

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A. Tenant shall further pay to Landlord any amount by which the real property taxes on the premises (Building E-13 Section 4-A - 16,000 sq. ft.), and any expenses incurred by Landlord to reduce property taxes allocable to the premises, for any year during the term of this Lease commencing with the calendar year 1993, exceed those for 1992 (the "base year"). Taxes for the base year on the premises (land and improvements, which is proportionately allocated among the several premises contained within each tax parcel) are calculated as follows:

.704 Acres Demised Premises	x	$13,019.72 Fair Market Value	=	$ 9,165.88
			=	34,660.00
				$ 43,825.88
		1992 Tax Rate	=	.016836
Base Year Taxes Due on Demised Premises			=	$ 737.85

The same method of calculation shall be used for each subsequent year, including adjustments for alterations and new improvements made to the premises.

Landlord will provide Tenant each year with a complete computation of the taxes for the demised premises and within thirty (30) days thereafter Tenant will pay Landlord the increase in taxes over the base year taxes.

Real property taxes include all assessments and other governmental levies, ordinary and extraordinary, foreseen and unforeseen, which are assessed or imposed upon the premises or become payable during the term of this Lease.

B. Tenant shall also pay to Landlord any amount by which the property insurance premiums allocable to the demised premises for any year during the term of this Lease exceed the annual premium of $ 135.28 presently paid by Landlord for the demised premises prior to Tenant's occupancy. In determining whether increased premiums are allocable to the demised premises, any schedules or rating procedures, as well as general rate increases, as determined by the organization issuing the insurance shall be conclusive evidence of the several items and charges which make up the insurance rates and premiums on the demised premises. Landlord will provide Tenant with a complete computation of any premium increase on the demised premises and within thirty (30) days thereafter Tenant will pay Landlord the insurance premium increase as set forth in the computation.

C. If this Lease is terminated at other than the end of a calendar year, all amounts payable by Tenant to Landlord under the provisions of this Paragraph 13 shall be prorated on the basis of a 360-day year, 30 days allocated to each month.

14. **ASSIGNMENT AND SUBLETTING:** Tenant shall not transfer or assign this Lease or any interest therein nor sublet or otherwise make available ("transfer") to any third party any part of the demised premises without first notifying Landlord in writing and receiving the written consent of Landlord to such transfer. The written notice to Landlord shall describe the area to be transferred and the rent and other consideration receivable for such transfer. A transfer by Tenant without the written consent of Landlord first received shall permit Landlord to terminate this Lease pursuant to Paragraph 24.

No transfer consented to by Landlord shall relieve Tenant of its obligations hereunder, and Tenant shall continue to be liable as principal as though no transfer had been made. It is agreed that a transfer by corporate merger or to an affiliated corporation shall not be subject to the provisions of this Paragraph 14 so long as the transferee has a net worth equal to or in excess of the net worth of Tenant.

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15. **DAMAGE OR DESTRUCTION:**

A. If the demised premises or any part thereof shall be damaged or destroyed by fire or other casualty, Landlord shall promptly repair all such damage and restore the demised premises without expense to Tenant, subject to delays due to adjustment of insurance claims, strikes and other causes beyond Landlord's control. If such damage or destruction shall render the premises untenable in whole or in part, the rent shall be abated wholly or proportionately as the case may be until the damage shall be repaired and the premises restored. If the damage or destruction shall be so extensive as to require the substantial rebuilding (i.e., expenditure of twenty-five (25%) percent or more of replacement costs) of any one building included in the demised premises, either party may elect to terminate this Lease by written notice to the other within thirty (30) days after the occurrence of such damage or destruction.

B. Tenant and Landlord hereby mutually release and waive their entire right of recovery against the other party for any and all loss or damage to the improvements, all personal property of Tenant, and any installations, betterments or improvements added to the building by Tenant, where such loss is occasioned, caused or incurred by, or results from fire windstorm, hail, explosion, riot attending strike, civil commotion, aircraft, vehicles, smoke and vandalism and all other perils which are insurable against, whether said loss occurred or was caused by the negligence of the Tenant or Landlord, their agents, servants, employees, sublessees or concessionaires, or otherwise. Landlord and Tenant each further warrant that insurance companies insuring Landlord or Tenant shall have no rights against the other, whether by assignments, subrogation or otherwise. Willful misconduct of a criminal nature lawfully attributable to either party shall to the extent that said conduct contributes to loss or damage not be excused under this Paragraph.

16. **AUTOMATIC SPRINKLER SYSTEM:** Landlord agrees to maintain the Automatic Sprinkler System to conform with the requirements of the Utah Fire Rating Bureau for grading the building as an Automatic Sprinklered Building. Tenant agrees to repair any damage to this system arising out of its occupancy, and to hold Landlord free and harmless from damage to or destruction of any and all property resulting from leakage of said Automatic Sprinkler System, during the term of this Lease or any extension thereof, or any holdover occupancy.

17. **OVERHEAD CRANES:** Delete

18. **INDEMNIFICATIONS:** Tenant shall pay and shall indemnify and hold Landlord and its principals, employees and agents harmless from and against any and all liabilities, fines, losses, damages, costs (including attorney's fees and expenses) causes of action, claims or judgments of any nature whatsoever, unless due to the negligence or willful misconduct of landlord or its principals, employees or agents, in connection with any and all of the following:

(a) any injury to, or the death of, any person on the premises or upon adjoining streets or walks, or in any way related to Tenant's use or occupancy of the premises;

(b) any theft of or damage to or destruction of goods, wares, merchandise and all other property of Tenant or others located on the premises or arising from Tenant's use of the premises;

(c) any negligent, careless or willful act of Tenant or any of its agents, contractors, servants, employees, assigns or subtenants, licensees or invitees, if any;

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(d) any violation by Tenant of any covenant, restriction, agreement or condition of this Lease; violation by Tenant of any contract or agreement to which Tenant is a party relating to Tenant's use of the premises, or violation by Tenant of any restriction, law, ordinance or regulation affecting the premises or any part thereof including the occupancy or use thereof.

Each of these indemnifications shall survive the expiration or termination of this Lease.

19. **INSURANCE:** Tenant agrees to carry adequate Workmen's Compensation Insurance to comply with the legal requirements of the State of Utah. Tenant agrees to carry adequate or appropriate Commercial General Liability insurance insuring against all liability exposure to third parties arising out of Tenant's operations or use of the premises, in a company or companies authorized to issue insurance in Utah, and to furnish to the Landlord Certificates of such insurance which include a thirty (30) day notice to the Landlord prior to any cancellation or reduction thereof by the company or companies.

20. **SURRENDER OF PREMISES:** Tenant agrees to surrender up the demised premises at the expiration, or sooner termination of this Lease, or any extension thereof, in the same condition, as when said premises were delivered to the Tenant, or as altered, pursuant to the provisions of this Lease, ordinary wear, tear and damage by the elements excepted. Tenant shall also remove all of its personal property from the demised premises not later than the time of termination. Tenant specifically covenants that upon termination the premises will be free of any hazardous waste material and that Tenant will be responsible for returning the premises to a condition meeting all requirements as may at such time or thereafter as may be imposed by governmental agencies regulating the handling of hazardous waste materials.

21. **HOLDOVER:** Should Tenant holdover the demised premises or any part thereof after the expiration of the term of this Lease, unless otherwise agreed in writing, such holding over shall constitute a tenancy from month-to-month only, and Tenant shall pay a sum equal to one and one-half (1-1/2) times the monthly rental provided herein, payable monthly in advance, but otherwise on the same terms and conditions as herein provided, except as to any provisions hereof relating to renewals of extensions.

22. **QUIET ENJOYMENT:** If and so long as the Tenant pays the rents reserved by this Lease and performs and observes all the covenants and provisions hereof the Landlord will, throughout the term of this Lease, warrant and defend the Tenant in the enjoyment and peaceful possession of the demised premises against all parties claiming a title to the premises superior to Landlord's and against all parties claiming by through or under Landlord.

23. **WAIVER OF COVENANTS:** It is agreed that the waiving of any of the covenants of this Lease by either party shall be limited to the particular instance and shall not be deemed to waive any other breaches of such covenant or any provision herein contained; nor shall waiver of any breach by another tenant be deemed to waive any breach by Tenant.

24. **DEFAULT PROVISIONS:**

A. The following events shall be considered events of default by Tenant:

(i) If default shall be made in the due and punctual payment of any rent or other sums payable under this Lease or any part thereof, when and as the same shall become due and payable, and such default shall continue for a period of ten (10) business days; or

(ii) If default shall be made by Tenant in the performance of or compliance with any of the covenants, agreements, terms or provisions contained in this Lease, and such default shall continue for a period of thirty (30) days after written notice thereof from Landlord to Tenant, except that in connection with a default not susceptible of being cured with due diligence within thirty days, the time within which Tenant shall cure the same shall be extended for such time as may be necessary to cure the same with all due diligence, provided Tenant commences within 7 days of the date of receipt of such notice to cure the same and proceeds diligently to affect such cure and further provided that such period of time shall not be so extended as to subject Landlord to any criminal liability; or

(iii) If the leased premises or any part thereof shall be abandoned or vacated or if Tenant shall be dispossessed therefrom by or under any authority other than Landlord.

B. Upon the occurrence of any such events of default, ındlord shall have the right to pursue any one or more of the ɔllowing remedies:

(i) Make performance for Tenant of any covenant or condition which Tenant is in default of and for the purpose advance such amounts as may be necessary. Any amounts so advanced or any expense incurred by Landlord by reason of the failure of Tenant to comply with any covenant, agreement, obligation or provision of this Lease or in defending any action to which Landlord may be subjected by reason of any such failure shall be due and payable to Landlord on demand, and interest shall accrue thereon from the date of expenditure at the rate of 18% per annum.

(ii) Terminate this Lease and end the term hereof by giving to Tenant written notice of such termination, in which event Landlord shall be entitled to recover from Tenant the amount of rent reserved in this Lease for the then balance of the term hereof; or

(iii) Without retaking possession of the premises or terminating this Lease, to sue monthly for and recover all rents, other required payments due under this Lease, and other sums, including damages and legal fees, at any time and from time to time accruing hereunder; or

(iv) Upon notice to all interested parties, reenter and take possession of the premises or any part thereof and repossess the same as of Landlord's former estate and expel Tenant and those claiming through or under Tenant and remove the effects of both or either (forcibly, if necessary) without being deemed guilty in any manner of trespass and without prejudice to any remedies for arrears of rent. Landlord may relet the premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as Landlord may deem advisable with the right to make alterations and repairs to the premises. Such re-entry or taking of possession of the premises by Landlord shall not be construed as an election on Landlord's part to terminate this Lease unless a written notice of termination be given to Tenant or unless the termination thereof be decreed by a court of competent jurisdiction. In the event of Landlord's election to proceed under this subparagraph, then such repossession shall not relieve Tenant of its obligations and liabilities under this Lease, all of which shall survive such repossession, and Tenant shall pay to Landlord as current liquidated damages, the rent and other sums hereinabove provided which would be payable hereunder if such repossession had not occurred, less the net proceeds (if

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any) of reletting of the premises after deducting all of the Landlord's expenses in connection with such reletting, including but without limitation all repossession costs, brokerage commissions, legal expenses, attorneys' fees, expenses of employees, alteration costs and expenses of preparation for such reletting. Such reletting may be in the name of Landlord or otherwise, for such term or terms (which may be greater or less than the period which would otherwise have constituted the balance of the term of this Lease) and on such conditions (which may include concessions or free rent) as Landlord, in its uncontrolled discretion, may determine and may collect and receive the rents therefor. Landlord shall make a reasonable effort to relet the premises to acceptable tenants, but Landlord shall in no way be responsible or liable for any failure to relet the demised premises or any part thereof or for any failure to collect any rent or other charges due upon such reletting. Tenant shall pay such current damages to Landlord on the days on which the rent would have been payable hereunder if possession had not been retaken and Landlord shall be entitled to receive the same from Tenant on such day.

Use of any of the foregoing remedies shall not preclude pursuit of any of the other remedies provided for herein. Failure by Landlord to enforce one or more of the remedies herein provided upon an event of default shall not be deemed or construed to constitute a waiver of such default, or of any other violation or breach of any of the terms, provisions and covenants herein contained.

25. **BANKRUPTCY OR INSOLVENCY:**

A. In the event that Tenant shall become a debtor under Chapter 7 of the Bankruptcy Code and Tenant's trustee or Tenant shall elect to assume this Lease for the purpose of assigning the same or otherwise, such election and assignment may be made only if the provisions of Paragraphs 26.B. and 26.D. are satisfied. If Tenant or Tenant's trustee shall fail to elect to assume this Lease within 60 days after the filing of such petition or such additional time as provided by the court within such 60-day period, this Lease shall be deemed to have been rejected. Immediately thereupon Landlord shall be entitled to possession of the Premises without further obligation to Tenant or Tenant's trustee and this Lease shall terminate, but Landlord's right to be compensated for damages in any such proceeding shall survive.

B. In the event that a petition for reorganization or adjustment of debts is filed concerning Tenant under Chapter 11 of the Bankruptcy Code, or a proceeding is filed under Chapter 7 of the Bankruptcy Code and is transferred to Chapter 11, Tenant's trustee or Tenant, as debtor-in-possession, must elect to assume this Lease within 120 days from the date of the filing of the petition under Chapter 11 or Tenant's trustee or the debtor-in-possession has failed to perform all of Tenant's obligations under this Lease within the time periods (excluding grace periods) required for such performance, no election by Tenant's trustee or the debtor-in-possession to assume this Lease, whether under Chapter 7 or Chapter 11, shall be effective unless each of the following conditions has been satisfied:

(1) Tenant's trustee or the debtor-in-possession has cured all defaults under the Lease, or has provided Landlord with Assurance (as defined below) that it will cure, (i) all defaults susceptible of being cured by the payment of money within 10 days from the date of such assumption and that it will cure all other defaults under this Lease which are susceptible of being cured by the performance of any act promptly after the date of such assumption.

(2) Tenant's trustee or the debtor-in-possession

has compensated, or has provided Landlord with Assurance that within 10 days from the date of such assumption it will compensate Landlord for any actual pecuniary loss incurred by Landlord arising from the default of Tenant, Tenant's trustee, or the debtor-in-possession indicated in any statement of actual pecuniary loss sent by Landlord to Tenant's trustee or the debtor-in-possession.

(3) Tenant's trustee or the debtor-in-possession has provided Landlord with Assurance of the future performance of each of the obligations under this Lease of Tenant, Tenant's trustee or the debtor-in-possession, and if Tenant's trustee or the debtor-in-possession has provided such Assurance Tenant's trustee or the debtor-in-possession shall also (i) deposit with Landlord, as security for the timely payment of rent hereunder, an amount equal to three (3) monthly installments of rent which shall be applied to installments of rent in the inverse order in which such installments shall become due provided all the terms and provisions of this Lease shall have been complied with, and (ii) pay in advance to Landlord on the date rent is due and payable one-twelfth of Tenant's other annual obligations pursuant to this Lease. The obligations imposed upon Tenant's trustee or the debtor-in-possession by this Paragraph shall continue with respect to Tenant or any assignee of this Lease after the completion of bankruptcy proceedings.

For purposes of this Paragraph 25, Landlord and Tenant acknowledge that "Assurance" shall mean no less than: Tenant's trustee or the debtor-in-possession has and will continue to have sufficient unencumbered assets after the payment of all secured obligations and administrative expenses to assure Landlord that sufficient funds will be available to fulfill the obligations of Tenant under this Lease and there shall have been deposited with Landlord sufficient cash to secure to Landlord the obligation of Tenant to cure the defaults under this Lease, monetary and/or non-monetary within the time periods set forth above.

C. In the event that this Lease is assumed in accordance with Paragraph 25(B) and thereafter Tenant is liquidated or files a subsequent petition for reorganization or adjustment of debts under Chapter 11 of the Bankruptcy Code, Landlord may, at its option, terminate this Lease and all rights of Tenant hereunder, by giving Tenant notice of its election to so terminate within 30 days after the occurrence of either of such events.

D. If Tenant's trustee or the debtor-in-possession has assumed the Lease pursuant to the terms and provisions of Paragraphs 25(A) or 25(B) for the purpose of assigning (or elects to assign) this Lease, this Lease may be so assigned only if the proposed assignee has provided adequate assurance of future performance of all of the terms, covenants and conditions of this Lease to be performed by Tenant. Landlord shall be entitled to receive all cash proceeds of such assignment. As used herein "adequate assurance of future performance" shall mean that no less than each of the following conditions has been satisfied:

(1) The proposed assignee has furnished Landlord with either (i) a current financial statement audited by a certified public accountant indicating a net worth and working capital in amounts which Landlord reasonably determines to be sufficient to assure the future performance by such assignee of Tenant's obligations under this Lease or (ii) a guarantee or guarantees, in form and substance satisfactory to Lessor, from one or more persons with a net worth satisfactory to Landlord.

(2) The proposed assignment will not release or impair any guaranty of the obligations of Tenant (including the proposed assignee) under this Lease.

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E. When, pursuant to the Bankruptcy Code, Tenant's trustee or the debtor-in-possession shall be obliged to pay reasonable use and occupancy charges for the use of the premises, such charges shall not be less than the Fixed Rent and Additional Rent payable by Tenant under this Lease.

F. Neither the whole nor any portion of Tenant's interest in this Lease or its estate in the premises shall pass to any trustee, receiver, assignee for the benefit of creditors, or any other person or entity, or otherwise by operation of law unless Landlord shall have consented to such transfer in writing. No acceptance by Landlord of rent or any other payments from any such trustee, receiver, assignee, person or other entity shall be deemed to constitute such consent by Landlord nor shall it be deemed a waiver of Landlord's right to terminate this Lease for any transfer of Tenant's interest under this Lease without such consent.

26. **ATTORNEY'S FEES:** In the event either party shall enforce the terms of this Lease by suit or otherwise, the party at fault shall pay the costs and expenses incident thereto, including reasonable attorney's fees.

27. **FAILURE TO PERFORM COVENANT:** Except for Tenant's obligation to pay rent and to pay other monies including maintenance of insurance, any failure on the part of either party to perform any obligation hereunder, and any delay in doing any act required hereby shall be excused if such failure or delay is caused by any strike, lockout or governmental restriction to the extent and for the period that such continues.

28. **RIGHTS OF SUCCESSORS AND ASSIGNS:** The covenants and agreements contained in this Lease shall apply to, inure to the benefit of, and be binding upon the parties hereto and upon their respective successors in interest and legal representatives.

29. **TIME:** Time is of the essence of this Lease and every term, covenant and condition herein contained.

30. **LIENS:** Tenant agrees not to permit any lien for monies owing by Tenant to remain against the premises for a period of more than thirty (30) days following discovery of the same by Tenant; provided, however, that nothing herein contained shall prevent Tenant, in good faith and for good cause, from contesting in the courts the claim or claims of any person, firm or corporation growing out of Tenant's operation of the demised premises or costs of improvements by Tenant on the said premises, and the postponement of payment of such claim or claims, until such contest shall finally be decided by the courts shall not be a violation of this Lease or any covenant hereof. Should any such lien be filed and not released or discharged or action not commenced to declare the same invalid within thirty (30) days after discovery of same by Tenant, Landlord may at Landlord's option (but without any obligation so to do) pay or discharge such lien and may likewise pay and discharge any taxes, assessments or other charges against the premises which Tenant is obligated hereunder to pay and which may or might become a lien on said premises. Tenant agrees to repay any sums so paid by the Landlord upon demand therefor, together with interest at the rate of eighteen (18%) percent per annum from the date any such payment is made.

31. **LIMITATION OF LANDLORD'S LIABILITY:** The obligations of Landlord under this Lease do not constitute personal obligations of the individual partners of Landlord and Tenant shall look solely to the real estate that is the subject of this Lease and to no other assets of the Landlord for satisfaction of any liability in respect of this Lease and will not seek recourse against the individual partners of Landlord or any of their personal assets for

such satisfaction.

32. **EMINENT DOMAIN:** In the event any power of eminent domain shall ever be used by any government authority, federal, state, county or municipal, or by any other party vested by law with such power, for the taking of the premises or any substantial portion thereof, and if such taking shall prevent the full use and enjoyment of the premises by Tenant for the purposes set forth herein, Tenant shall have the right thereupon to terminate this Lease by giving written notice to Landlord.

In the event of the taking of a substantial portion less than the whole of the premises, Tenant may elect, in lieu of exercising its right of termination, to continue in possession, under the terms of this Lease, of the portion of the premises not so taken, and the rent hereunder shall be abated by such proportion as the number of square feet of the building floor space taken bears to the total number of square feet of building floor space included in the premises. In such event, if any portion of any building or buildings comprising the premises shall have been taken, Landlord shall restore such building or buildings by repairing and enclosing the same to the extent necessary and possible to provide an integral and complete building suitable for the purposes set forth in Paragraph 2 hereof, giving effect to the reduced size of the premises.

Any award or compensation for damages, whether resulting by judgement or verdict after trial or by agreement under threat of condemnation, applying to the leasehold interest created hereby, shall be paid to Landlord, and Tenant hereby authorizes Landlord as attorney-in-fact of Tenant to enter into any agreement or compromise, execute any instrument of transfer or assignment or otherwise, and do any other acts in connection with such leasehold interest and such eminent domain proceedings as Landlord, in its discretion, shall determine; provided, however, Landlord shall hold the proceeds of any such compensation, award or settlement (other than severance damages which may be awarded to Landlord by reason of the severance of the premises or a portion thereof from other lands owned by Landlord) in trust for the benefit of Landlord, Tenant and any mortgagee as their interests may appear.

When Tenant claims an interest in any such proceeds, Tenant's leasehold interest for purposes of measuring Tenant's interest in such proceeds shall be deemed limited to the remainder of the term of this Lease then in effect, and no future right of extension or renewal at Tenant's option shall be construed to enlarge Tenant's leasehold interest for such purposes.

33. **SUBORDINATION OF LEASE TO MORTGAGES ON THE DEMISED PREMISES:** This Lease shall be subject and subordinate to any mortgage (or trust deed) now existing or hereafter placed on the demised premises given to secure a loan made by a lender to Landlord, and to any renewals, replacements, extensions or consolidations thereof, which shall contain a provision that, so long as Tenant shall not be in default in the performance of its obligations under this Lease in such manner and after such notice as would entitle Landlord to terminate this Lease, the holder of such mortgage shall not disturb the possession of Tenant or terminate this Lease.

34. **REPRESENTATIONS:** Tenant acknowledges that the Landlord has made no agreement or promise concerning the alteration, improvement, adaptation or repair of any part of the premises which has not been set forth herein, and that this Lease contains all the agreements made and entered into between the Tenant and the Landlord.

35. **LIGHTS ON EXTERIOR OF BUILDING.** Tenant shall burn the lights affixed to the exterior of any building it occupies from one (1) hour after sunset to one (1) hour before sunrise nightly.

36. **OUTSIDE STORAGE:** Other than self-propelled vehicles, nothing may be stored outside of a building without written consent of the Landlord.

37. **SECURITY DEPOSIT:** Delete

38. **GARBAGE COLLECTION:** Cost of garbage collection shall be borne by Tenant. Arrangement for such service shall be made by Tenant, subject to approval of Landlord.

39. **RULES AND REGULATIONS:** Landlord has found it necessary to post vehicular traffic control signs on streets and may from time to time impose certain traffic and parking rules and regulations at Freeport Center. Tenant agrees to comply with, and use reasonable efforts to cause its employees and other personnel, to comply with such posted signs and rules and regulations, and Tenant shall be responsible for causing its employees to park in designated areas and to operate their motor vehicles within posted speed limits and in accordance with other traffic signs.

40. **CONSTRUCTION OF LEASE:** Words of any gender used in this Lease shall be held to include any other gender, and words in the singular number shall be held to include the plural when the sense requires. Interpretation, construction and performance of this Lease shall be governed by the laws of Utah. Each of the parties who execute this Lease as Tenant shall be jointly and severally liable for all obligations of Tenant under this Lease.

41. **PARAGRAPH HEADINGS:** The paragraph headings as to the contents of particular paragraphs herein are inserted only for convenience and are in no way to be construed as part of such paragraph or as a limitation on the scope of the particular paragraph to which they refer.

42. **NOTICES:** Any notice required or permitted to be given hereunder shall be deemed sufficient if given by communication in writing by express over-night mail, by public or private carrier, postage prepaid and certified, and addressed as follows:
If to the Landlord, at the following address:

FREEPORT CENTER ASSOCIATES
P.O. Box 1325 - Freeport Center
Clearfield, Utah 84016

If to the Tenant, at the following address:

ENERCO INC.
45 North Station Plaza
Great Neck, NY 11021

43. **OPTION TO TERMINATE LEASE - Bldg. E-13 Sec. 3-A:** Tenant shall have the option to terminate its other lease for Bldg. E-13 Sec. 3-A on the following conditions: 1) Tenant must provide Landlord 90 days written notice of its intent to terminate the Bldg. E-13 Sec. 3-A Lease; 2) Any termination shall be at the end of a month and; and 3) Tenant shall return the premises in a clean and structurally sound condition pursuant to the terms of the

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

TENANT:	**LANDLORD:**
ENERCO INC.	FREEPORT CENTER ASSOCIATES
By _____	By _____
Its President	Its Partner

APPENDIX "C"

Michael L. Schwab [A4662]
Lloyd A. Hardcastle [A5079]
SCHWAB & HARDCASTLE
225 South 200 West
P.O. Box 118
Farmington, Utah 84025-0118
Telephone: (801) 451-6560
Fax: (801) 451-8216
Attorneys for Plaintiff

IN THE SECOND DISTRICT COURT OF THE JUDICIAL DISTRICT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

ENERCO, INC., Plaintiff, vs. SOS STAFFING SERVICES, INC., FREEPORT CENTER ASSOCIATES, et al., Defendants.	**AFFIDAVIT OF JAMES KIM** Civil No.: 970700262 CN Honorable Thomas L. Kay

The undersigned individual, James Kim, being duly sworn, hereby states the following:

1. I am the Managing Director for the plaintiff in this case, ENERCO, Inc., a.k.a. ENERCO of Utah, Inc. ("ENERCO").

2. I am fully familiar with the facts and circumstances surrounding this case and all statements made below are based on my own personal knowledge.

3. ENERCO is in the business of purchasing expensive equipment and other materials categorized as "surplus" from the

U.S. Government in large "lots" and reselling those items to other individuals and entities throughout the world.

4. In 1995, ENERCO had an extremely large warehouse at the Freeport Center in Clearfield, Utah, full of the type of equipment and materials referenced above, which ENERCO had purchased and was storing for future sale to its worldwide customers.

5. In 1995, ENERCO had many millions of dollars worth of such equipment stored at its warehouse at the Freeport Center. The management of Freeport Center Associates ("Freeport") was aware of the unique type of equipment and materials I had in the warehouse, and also was aware of the large volume of that equipment.

6. I personally entered into the lease agreements with Freeport on behalf of ENERCO.

7. At the time those agreements were entered into, I spoke specifically with a Manager whose first name was "Steve." Because of the high value of ENERCO's property, I questioned him about security at the Freeport Center. I was given verbal assurances and representations from him regarding the security at the Freeport Center. Among other things, I was told that there would be security guards protecting the gate at the Freeport Center, that "there is ample security here," that ENERCO's property would be safe, and that he had never heard of anyone stealing from Freeport's tenants.

8. These statements were very important to me in deciding to store ENERCO's valuable goods at the Freeport Center, and I relied upon them in making my decision to do so.

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9. At the time the lease arrangements were made, I was given written materials from Freeport. In those materials, it was unequivocally stated that:

> Freeport Center is protected by five miles of ten foot chain link fencing. Gates are manned or locked during hours of darkness. A roving security guard patrols the center's 735 acres on weekends, at night and on holidays.

10. The materials given to me also represented that the Freeport Center was protected by "an electronic surveillance system" which was connected with "the Freeport Center Administrative Offices and patrol vehicle." I also relied on these written materials and the promises and representations made therein in deciding to store ENERCO's materials and equipment at the Freeport Center.

11. At the time of the thefts at issue in this case, I had never given Freeport any notice or indication whatsoever that ENERCO would be ending its lease or moving its property out of the Freeport Center.

12. Freeport's front office knew that I often went overseas on extended trips, and also knew that while I was on such trips, no one worked in or entered into my warehouse. Indeed, when I went on such trips, I would leave my keys to the warehouse with Freeport's front office so that no one else could gain access to the warehouse.

13. Prior to the time when I left on my overseas trip during which the thefts occurred, I went to Freeport's office and informed the employees in the office that I would be out of town for an extended period of time. As was my practice, I gave Freeport's

office the keys to my building so that no one else could gain access to the building while I was gone. All of the thefts occurred while Freeport had my keys and knew I was out of town.

14. Based on the verbal promises and representations made by Freeport, the provisions of the written lease agreement, the fact that Freeport had my keys and knew I was out of town, and the other facts set forth in ENERCO's written answers to Freeport's Interrogatories in this case, I feel strongly that Freeport breached its agreements and promises made to me, and was negligent in allowing several million dollars of our property to be stolen.

15. I have read this affidavit and the statements made herein are true and correct.

FURTHER AFFIANT SAITH NOT.

DATED this JUL - 9 1999 day of July, 1999.

James Kim

REPUBLIC OF KOREA)
STATE OF SPECIAL CITY OF SEOUL)
~~EMBASSY OF THE~~) ss.) S.S
UNITED STATES OF AMERICA)
COUNTY OF _____)

On the JUL - 9 1999 day of July, 1999, personally appeared before me James Kim, whose identity has been proven on the basis of satisfactory evidence, being first duly sworn, acknowledges that he executed the foregoing instrument, for the purposes stated therein, of his own voluntary act.

NOTARY PUBLIC Michele M. Siders
Vice Consul

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